

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JESUS J. VAZQUEZ)	
Claimant)	
VS.)	
)	Docket No. 270,552
ATOFINA CHEMICALS)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
c/o AMERICAN INTERNATIONAL GROUP)	
Insurance Carrier)	
)	

ORDER

Respondent and its insurance carrier appeal from the November 29, 2001 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

Issues

Judge Clark found claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on or about August 14, 2001, and that the respondent had timely notice of claimant's accidental injury. Accordingly, preliminary benefits of medical treatment and temporary total disability compensation were ordered paid. Respondent disputes those findings and seeks Appeals Board (Board) review of whether claimant suffered personal injury by accident arising out of and in the course of his employment and whether timely notice was given. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing Order.¹

¹ K.S.A. 44-534(a)(2) and K.S.A. 44-551(b)(1).

Findings of Fact and Conclusions of Law

On August 14, 2001, claimant injured his low back when, in the course of performing light duty work for respondent, he was sitting taping valves and bent over to pick valves up off the floor. He immediately felt pain in his low back and yelled out. Claimant had also experienced back pain the day before while driving a forklift. Claimant attributed that pain to the jolting from driving over jumps and ramps on the forklift in the course of unloading bottles from trailers. Claimant told a co-worker, Juan, about his back pain on August 14th but did not report his work related injury to a supervisor on either that day or the day before.

By the time claimant arrived at home his pain had increased. He could not move his legs very well and his wife helped him into the house. Claimant's brother and sister-in-law took him to the emergency room at Via Christi Regional Medical Center. He described right flank, side and abdominal pain radiating to his back and nausea. He had lumbosacral spasm and pain with movement. The hospital records further show that claimant reported the onset of his symptoms as 2:30 p.m. that day and getting progressively worse.

He was given a shot for pain and a prescription for pain medications and anti-inflammatories. Gallstones or kidney stones were also suspected and a CT of his urinary tract, abdomen and pelvis was obtained. It was negative. Upon his release from the hospital claimant was instructed to remain off work until August 17, 2001 and to follow up with his physician. The hospital emergency room records do not specifically mention any accident or work related injury. But as claimant's work hours were 6:00 a.m. to 4:30 p.m., the emergency room record that said claimant reported the onset of his symptoms was 2:30 p.m. is consistent with the back injury occurring at work. Furthermore, claimant denied suffering any accident or injury to his back away from work.

The next day, claimant called work. Claimant said that when he called and reported this incident to his supervisor, Trino Valderas, he related that the injury occurred at work, but a transcript of a recording of that call shows that he only reported that "I cannot go to work today or tomorrow because the doctor put me under observation for something that happened to me last night and I had to go to the emergency room."² Mr. Valderas, claimant's supervisor, testified that claimant made a second telephone call to him on August 16 but denied claimant ever reported his injury was work related. Respondent took a discovery deposition from claimant on August 31, 2001, which was approximately 17 days after claimant's accident. Respondent points out that this deposition was taken because of a different injury which is the subject of a separate workers compensation claim

² Tr. of Prel. H., Respondent's Ex. 1 (Nov. 27, 2001).

and contends this was the first notice it received that claimant was alleging his August 14, 2001 back injury was work related.

Claimant saw Dr. Leslie Greenberg on August 15, 2001 with complaints of severe back pain since “yesterday.” Dr. Greenberg’s records indicate that claimant “notes no injury, no trauma.”³ He was continued on the same medications prescribed in the emergency room and a followup visit was scheduled for August 20. At that visit an MRI was ordered for September 4th. The results of that MRI are not in evidence, but claimant described it as showing “three discs out of place.”⁴ Claimant has also been seen by orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster’s records are likewise not in evidence except for the work restrictions he gave of no lifting over ten pounds, no repetitive lifting over five pounds, no forward bending or twisting and to stand and sit intermittently.⁵ Apparently, respondent could not accommodate those restrictions as claimant has not returned to work.

Conclusions of Law

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.⁶ “ ‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁸

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports claimant’s contention that his back injury occurred at work, but fails to support the claimant’s contention that he reported his injury was work related when he telephoned his supervisor on either August 15 or 16, 2001. Claimant testified he reported his back injury was work related when he spoke to Mr. Valderas on the telephone

³ Tr. of Prel. H., Respondent’s Ex. 3 (Nov. 27, 2001).

⁴ Tr. of Prel. H., at 12 (Nov. 27, 2001).

⁵ Tr. of Prel. H., Claimant’s Ex. 1 (Nov. 27, 2001).

⁶ K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

⁷ K.S.A. 44-508(g). *See also* In Re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁸ K.S.A. 44-501(g).

on August 15. Mr. Valderas testified that he did not personally speak to claimant by telephone on August 15, but rather claimant left a recorded message on his voice mail. A transcript of that recording fails to describe the injury as work related. Mr. Valderas testified he did speak personally with claimant by telephone on August 16, but again, claimant failed to say that his injury was work related. Although claimant disputes this, the transcript of the first telephone message supports Mr. Valderas's version of the conversation. The Board, therefore, accepts Mr. Valderas's description of the August 16 telephone conversation over that of claimant's.

Claimant's position is that he gave notice within ten days during his telephone conversation with Mr. Valderas. He is not alleging that there is just cause for his failure to give notice within ten days so as to extend the time for giving notice. There is no evidence that respondent otherwise received notice within ten days as required by K.S.A. 44-520. Therefore, the Administrative Law Judge's decision to award preliminary benefits should be reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁹

WHEREFORE, it is the finding, decision, and order of the Board that the Order entered by Administrative Law Judge John D. Clark on November 29, 2001 should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and Insurance Carrier
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁹ K.S.A. 44-534a(a)(2).

JESUS VAZQUEZ

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